governed by the act of 1836,[13] and pointed out the correct procedure under that statute. The case illustrates an interesting point in practice and gives an opportunity to compare the Pennsylvania method with that used in other jurisdictions.

W. H. N.

BURDEN OF PROOF OF CHARACTER OF EMPLOYMENT IN WORKMEN'S COMPENSATION CASES.—A brakeman, on duty on a train which it was agreed carried both interstate and intrastate commerce, and was therefore an interstate traffic movement,[1] was caught between two of the cars of this train and killed. Suit was brought by the brakeman's widow under the Pennsylvania Workmen's Compensation Act. The state referee held that it was incumbent upon the defendant carrier to show that, when this man was killed, he was engaged in the performance of his duties as a member of this interstate train crew and that he had not been detached from such duties and sent upon some possible errand of a purely intrastate character. In due course this ruling of the referee was affirmed by the Supreme Court of Pennsylvania.[2]

The Supreme Court of the United States, however, reversed the Supreme Court of Pennsylvania.[3] Mr. Justice McKenna, in delivering the opinion of the court, said, "We cannot accede to the view that there is a presumption that duties performed on a train of interstate and intrastate commerce were performed in the latter commerce. The presumption indeed might be the other way." And again, "If there be an assertion of a claim or remedy growing out of an occurrence in which there are constituents of interstate commerce, the burden of explanation and avoidance is on him who asserts the claim or remedy, not on the railway company to which it is directed."

The tendency of the recent decisions of the Supreme Court of the United States has been toward regarding as interstate in character any employment in which a part of the duties are of such character and where the nature of the employment is such that it cannot be readily and obviously divided into successive periods of interstate and intrastate service.[4] Nothing in these decisions, how-

[13] Note 6, *supra*.

[1] Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327 (1912); N. Y. Central R. R. v. Winfield, 244 U. S. 147, 61 L. Ed. 1045 (1917).

[2] Polk v. Philadelphia & Reading R. R., 266 Pa. 335, 109 Atl. 627 (1920).

[3] Philadelphia & Reading R. R. v. Polk, 65 Sup. Ct. 630 (U. S. 1921).

[4] Southern R. R. v. Puckett, 244 U. S. 571, 61 L. Ed. 1321 (1917); N. Y. Central R. R. v. Porter, 249 U. S. 168, 63 L. Ed. 536 (1919); Phila., B. & W. R. R. v. Smith, 250 U. S. 101, 63 L. Ed. 869 (1919); Phila. & Reading R. R. v. Di Donato, 65 Sup. Ct. 628 (U. S. 1921). In this last case the deceased was a watchman at a railroad crossing. Both interstate and intrastate traffic passed this crossing. The court refused to consider a division of

ever, repudiates the principle announced in that line of decisions of which Illinois Central Railroad v. Behrens [5] is a typical example. In that case it was held that where an employee is injured while serving as a member of a train crew, the character of his employment depends upon the nature of the traffic carried by that train. So if an employee is injured while repairing rolling stock in a repair shop, the character of his employment is interstate only if the particular car which he is repairing has been, at the time of the repairs, definitely assigned to interstate traffic.[6] Under the Behrens case,[7] therefore, it is not enough merely to show that a brakeman or conductor is a member of a shifting crew which during the day handles a number of trains, some interstate and some intrastate. His day's work, viewed as a whole, deals with both kinds of traffic, and, since that work is easily divisible into specific and clearly divided periods, his employment is held to shift in character as the train which he is switching either does, or does not, carry interstate traffic. The case of Philadelphia and Reading R. R. v. Polk [8] deals with this sort of an employment. There is language used, however, in the course of the opinion which may lead to the idea that wherever a train-hand's duties require him to pass from dealing with the one to the other form of traffic, the burden rests upon the claimant to show the precise nature of the traffic in which the injured employee was engaged at the time of the accident. Does it in fact establish such a doctrine?

It is necessary to revert to the facts of the Polk [9] case and the language of the court therein, to ascertain whether that language was intended to have so broad a meaning. The agreed facts were that the brakeman was killed while employed upon a train which was carrying interstate traffic. Therefore, under the Behrens [10] case his employment on and about that train was itself interstate in character. If this fact is borne in mind, the statement of Mr. Justice McKenna that, "If there be an assertion of a right or remedy growing out of an appearance in which there are constituents of interstate commerce, the burden of explanation and avoidance is on him who asserts the claim or remedy, not on the railway company

this watchman's time but held him engaged in interstate commerce. The court stated, "To separate his [watchman's] duties by moments of time or particular incidents of its exertion would be to destroy its unity and commit it to confusing controversies."

[5] 233 U. S. 473, 58 L. Ed. 1051 (1914).

[6] Minn. & St. L. R. R. v. Winters, 242 U. S. 353, 61 L. Ed. 358 (1917). See also Boyle v. P. R. R., 228 Fed. 266 (C. C. A. 1916); Chicago, R. I. & P. R. R. v. Ind. Board, 273 Ill. 528, 113 N. E. 80 (1916).

[7] Note 5, *supra.*

[8] Note 3, *supra.*

[9] Notes 2 and 3, *supra.*

[10] Note 5, *supra.*

to which it is directed," is seen to be appropriate to the facts, limited to them, and not intended to go beyond them. The admitted facts show that the brakeman was employed upon an interstate train and that he suffered from an accident which was sustained during the performance of the ordinary duties of a brakeman on such a train. It seems evident, therefore, that it should be incumbent upon the claimant to take him out of this employment, into which the agreed facts had placed him.

Had there been no agreement as to the character of the traffic carried by the train on which the brakeman was employed when killed, the Polk case would have raised a question of great importance upon which there is a conflict of authority in the state decisions and as to which the only United States Supreme Court decision [11] is not conclusive. In an action brought in a state court by an employee of an interstate carrier, either under the common law or the statute law of the state, upon whom rests the burden of establishing the nature of the traffic which such train was carrying? Upon the answer to that question depends the interstate or intrastate character of the injured workmen's employment. Must the injured man prove that the train was not engaged in interstate commerce in order to establish his right to recover under the state law? Or must the common carrier show that the train did carry interstate commerce in order to oust the jurisdiction of the state court? The majority of state courts [12] hold that the employee has made out a *prima facie* case by showing an injury falling within the terms of the state compensation act. The defendant carrier must, therefore, plead and prove facts which show that the employment was interstate in character, and hence within the exclusive control of the Federal Employer's Liability Act. New Jersey alone holds to the contrary.[13]

It is submitted that the very nature of the respective powers under which the Federal Liability Act was passed and under which

[11] Osborne v. Gray, 241 U. S. 16, 60 L. Ed. 865 (1916).

[12] Erie Railroad v. Welsh, 89 Ohio 81, 105 N. E. 189 (1913); Chicago R. I. and P. R. R. v. McBee, 45 Okla. 192, 145 Pac. 331 (1914); Zavitovsky v. Chicago, M. & St. Paul R. R., 161 Wis. 461, 154 N. W. 954 (1915); Chicago, R. I. and P. R. R. v. Industrial Board of Ill., 273 Ill. 528, 113 N. E. 80 (1916); Terry v. Southern Pac. R. R., 34 Cal. App. 330, 169 Pac. 86 (1917); Ill. C. R. R. v. Industrial Board, 284 Ill. 267, 119 N. E. 920 (1918); A., T. & S. F. R. R. v. Industrial Comm., 290 Ill. 590, 125 N. E. 380 (1919); Chicago & A. R. R. v. Industrial Comm., 290 Ill. 599, 125 N. E. 378 (1919); Rockford City T. Co., v. Industrial Comm., 295 Ill. 358, 129 N. E. 135 (1920).

The New York Compensation Act has an express provision that there is a presumption that the claimant comes within the provisions of the act. N. Y. Consol. Laws, C. 67, sec. 21. Fish v. Rutland R. R., 189 App. Div. 352, 178 N. Y. S. 439 (1919); Saccomanno v. Grass River R. R., 191 App. Div. 761, 182 N. Y. S. 23 (1920).

[13] Lincks v. Erie R. R., 91 N. J. L. 166, 103 Atl. 176 (1918); Carberry v. D., L. & W. R. R., 93 N. J. L., 414, 108 Atl. 364 (1919).

state compensation statutes were enacted, support the majority view. The power of a state to determine by judicial decision interpreting its common law, or by legislative enactment, the rights and liabilities arising out of industrial accidents, is not conferred upon the state by its own or by the Federal Constitution. It is a power which is inherent from its right to regulate the relation of its citizens *inter se*. It is unlimited except as it has been restricted by its own or the Federal Constitution. On the other hand the power of Congress to legislate on the subject is incidental to its delegated power to regulate commerce between the states and with foreign nations.[14] Congress has no power to legislate in regard to industrial accidents as such. Its power is conditional upon the injury having been sustained in the course of interstate commerce. It is not enough that the employer was engaged in interstate commerce. Both employer and employee must be engaged in interstate commerce at the time of the accident before it comes within the power of Congress.[15] It would, therefore, seem that one who asserts that the otherwise complete and sovereign power of a state to regulate matters of local concern is superseded or suspended in a particular case by an Act of Congress, must show that the case falls within that field over which power has been delegated to Congress. Otherwise the Act of Congress, though expressly purporting to deal with it, would be invalid and unconstitutional.[16]

The Polk case[17] may create doubt and uncertaintly because of the language used by the court in the course of its opinion. The actual decision, however, is limited to the facts as indicated. It does not decide or touch upon the important constitutional question as to the *locus* of the burden of proof of the character of the employment of a man injured or killed in the service of an interstate corrier, when relief is sought in the courts of the state in which the injury or death occurred.[18]

P. A. M.

[14] Constitution of the United States, Article I, Section 8.

[15] Second Employers' Liability Cases, note 1, *supra;* Pedersen v. D. L. & W. R. R., 229 U. S. 146, 57 L. Ed. 1125 (1913); Illinois Central R. R. v. Behrens, note 5, *supra.*

[16] It may be pointed out that the Employers' Liability Act is no more paramount over a Workmen's Compensation Act than it is over the common law of a state. It is true that practically all compensation laws are administered by commissions whose judicial power is limited to cases falling within the terms of such acts. It is submitted, however, that this fact does not make the question of the interstate or intrastate character of an accident one of the jurisdiction of the particular tribunal chosen by the state to administer the act. The question still remains one as to the respective powers of the state and national governments.

[17] Note 3, *supra.*

[18] In a recent case the Supreme Court of Pennsylvania, in following the Polk case, overruled its previous decisions on this question. Scanlon v. Payne, 271 Pa. 391 (1921).